Supreme Court, U.S.
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No. 99-1358

IN THE

Supreme Court of the United States

GIBSON GUITAR CORPORATION,

Petitioner,

v.

MEC IMPORT HANDELSGESELLSCHAFT GMBH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent, MEC Import Handelsgesellschaft GMBH, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

In this appeal Gibson seeks to avoid (or delay) payment of an international commercial arbitration award rendered by unanimous vote of three (3) highly qualified arbitrators. It was Gibson who initiated this litigation seeking to force its German distributor (MEC) to arbitrate this contract dispute in the United States rather than litigate the dispute in the courts of Germany.

The initial litigation resulted in the June 16, 1994, Consent Order to arbitrate under the rules of the International Chamber of Commerce and Arbitral Tribunal of the International Court of Arbitration.

Pursuant to the procedure adopted by the parties, each party selected an arbitrator and these individuals chose the third arbitrator.

On April 28, 1997, the Tribunal issued an "Interim Award" announcing that it would not be applying the law of Germany or the United States to the dispute but, rather, interpret the contract between the parties pursuant to recognized international principles. No objection to the Interim Award and no attempt to vacate the award was pursued by Gibson.

After a full evidentiary hearing, the Tribunal issued an award on October 31, 1997 to MEC for $837,818.12 with interest.

Though Gibson was the party who originally insisted on arbitration, it is now dissatisfied with the result and seeks to vacate the award through protracted litigation that has

delayed payment of the award for over two (2) years. Gibson's attempt to vacate the arbitration award has been denied by the U.S. District Court for the Middle District of Tennessee, and unanimously denied by the Sixth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

An arbitration award should be vacated only in the most extreme circumstances due to the strong public policy favoring alternative dispute resolution. Commercial arbitration provides cost efficient, expeditious resolution for the parties which benefits the world economy and relieves the burden on the judicial system.

In this appeal, Gibson attempts to transpose the Arbitration Tribunal's disregard of Gibson's interpretation of the contract into a "manifest disregard of the law". While recognized in theory, no case has been found where the "manifest disregard of the law" standard was used to vacate a commercial arbitration award in the federal courts.

Applying the "manifest disregard of the law" standard is particularly inappropriate in this case where the decision of the arbitrators turned on a question of fact dealing with the intent of the parties and interpretation of a written form contract that had handwritten modifications.

The plain language of the contract quoted on page two (2) of the petition states that Gibson will have no liability under this distribution agreement for lost profits ". . . **by reason of termination or expiration of this agreement** . . .". The Arbitration Tribunal did not interpret this to mean

that Gibson was at liberty to simply refuse to perform the contract by not shipping products ordered by MEC during the term of the contract or the back-orders arising during the term of the agreement. Thus, the losses of MEC did not arise from *termination* or *expiration* of the distribution agreement but, rather, from the refusal of Gibson to perform its obligations under the contract.

The argument that the Arbitration Tribunal should have awarded some form of specific performance is without merit. This remedy was not included within the terms of reference agreed upon by the parties which framed the issues to be decided by the Arbitration Tribunal. Specific performance was raised by Gibson for the first time when it made its attempt to vacate the arbitration award in the U.S. District Court.

To articulate a standard for the application of a "manifest disregard of the law" standard in a case that largely turned on questions of fact would be tantamount to an advisory opinion.

Lastly, Gibson has avoided its financial obligations for years through protracted litigation that first sought to require arbitration but, subsequently was aimed at vacating the resulting arbitration award. This undermines the very foundation of the policies favoring alternative dispute resolution. Indeed, this form of litigation thwarts the expeditious and efficient resolution of commercial disputes normally achieved through arbitration. To accept this case for review would only serve to encourage others to burden the judicial system by seeking review of the very arbitration procedures originally intended to decrease the burden on the courts.

I. POLICY CONSIDERATIONS.

The distribution agreement between the parties contained an arbitration clause and it was Gibson that initiated litigation to enforce the arbitration clause. MEC participated in the arbitration pursuant to the Agreed Order at great expense since the arbitration hearing took place in the United States. MEC urges the Court to uphold this routine international commercial arbitration award based upon the strong public policy favoring arbitration awards.

A. This Court should enforce federal and international public policy favoring alternative dispute resolution.

The United States courts and their international counterparts have strong public policy interests in encouraging the use of alternative dispute resolution. Arbitration is a valuable method because it does not require an agreement of the parties to resolve the disputes. If consistently enforced, arbitration awards can be an effective way to terminate and resolve disputes. Congress adopted the Federal Arbitration Act to ensure that courts would rigorously enforce private agreements to arbitrate, and it established an emphatic national policy favoring arbitration, which is binding on all courts, state and federal. *Singer v. Jeffries & Co.*, 575 N.E.2d 98 (N.Y. 1991). Arbitration agreements affecting commerce are "valid, irrevocable and enforceable" in state or federal courts. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed*, 364 U.S. 801 (1960).

In fact, these federal principles have been incorporated into arbitrations governed by the International Chamber of Commerce ("ICC"). ICC Rules of Arbitration provide that

"by submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made." ICC Rules of Arbitration, Article 24 ¶ 2.

Since arbitration is such an effective alternative dispute resolution method, the opportunity to appeal awards by judicial review undermines the original intention of alternative dispute resolution. In addition, an established standard exists under principles of contract law — "manifest disregard of the law". The standard is narrowly construed to prevent frivolous appeals. Further articulation of this standard is completely unnecessary and would encourage frivolous appeals by any party dissatisfied with an arbitration panel's decision.

Courts should be very hesitant to upset an arbitration award. *Karppinen v. Karl Kiefer Mach. Co.*, 187 F.2d 32 (2d Cir. 1951). If the grounds for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed. *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211 (2d Cir. 1972). Courts may not look into the merits of an arbitrable matter, nor may they retry matters submitted to arbitration on their merits. *Local 77, American Federation of Musicians v. Philadelphia Orchestra Assoc.*, 252 F. Supp. 787 (E.D. Pa. 1966). The reviewing court should not disturb the award of the arbitrator so long as the interpretation was not arbitrary. *Mogge v. District 8 Intern. Association of Machinists*, 454 F.2d 510 (7th Cir. 1971). In essence, Gibson wants this Court to do something no other court has done — overturn an arbitration award based on a "manifest disregard of the law".

B. In accordance with strong federal and international public policy favoring arbitration, this Court should be hesitant to upset an equitable award.

Prior to the issuance of the arbitrators' award, Gibson was the strongest advocate for arbitration as the exclusive and final remedy in this matter. Gibson acknowledges the Federal Arbitration Act favors enforcement of arbitration awards. In addition, Gibson acknowledges that lower courts recognize their ability to vacate an arbitration award where the arbitrator's decision is "in manifest disregard of the law". *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 135, 136 (6th Cir. 1996); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995). Contrary to Gibson's position, lower courts are reviewing cases under an established and articulated standard. Gibson's request to formalize this standard is unnecessary.

"An arbitrator's decision is entitled to substantial deference, and the arbitrator need only explicate his reasoning under the contract 'in terms that offer even a barely colorable justification for the outcome reached' in order to withstand judicial scrutiny." *In re: Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988). Certainly, the arbitration panel's decision offers more than a "colorable justification" through the tribunal's well-reasoned and detailed decision-making process. The process followed by the parties in this case included an initial selection of highly qualified arbitrators, a carefully drafted Terms of Reference, an Interim Award discussing the choice of law questions (approved by the ICC in Paris), and a detailed final award (also approved by the ICC Court in Paris). Clearly, the process was not arbitrary. This Court should not allow further delay of execution on the judgment. Any delay under these

circumstances would completely undermine the purpose of the alternative dispute resolution process.

II. GIBSON IS ESTOPPED FROM OBJECTING TO THE ARBITRATION AWARD.

If this matter were being adjudicated in court, Gibson would be judicially estopped from taking a contrary position from one taken earlier in the case. A party may not await an adverse arbitration award before asserting objections on grounds that were known to the party prior to the issuance of the award. *Graphic Arts Inter. Union, Local 97B v. Haddon Craftsmen, Inc.*, 489 F. Supp. 1088 (M.D. Pa. 1979). In drafting the arbitration provision, Gibson gave the arbitrators the discretion to choose the proper body of law to use in the arbitration. Gibson stipulated that the arbitration would be "fully and finally binding on both parties." Gibson reinforced this provision by its earlier argument that the parties' "interests will be better served by arbitration than by resort to courts if problems arise." Memorandum In Opposition to Motion to Dismiss, p. 15, citing *Georgia Power Co. v. Cimmaron Coal Co.*, 526 F.2d 101, 106 (6th Cir. 1975), 425 U.S. 952 (1976). Regardless, Gibson continues to stay MEC's execution on the judgment by arguing the arbitration panel's decision was "in manifest disregard of the law".

It is undisputed that Gibson did not object to the provisions of this Interim Award until over six (6) months after the final award was issued. According to the Federal Arbitration Act, "(n)otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney *within three months* after the award is filed or delivered. 9 U.S.C. § 12 (emphasis added).

The Interim Award was the arbitrators' *final* determination of the law applicable to this arbitration and is therefore a *final award on this point*. Gibson failed to make any objection to the arbitrators' choice of law until *after* the arbitration damage award was rendered in MEC's favor. Gibson's failure to object to the choice of law provision in the Interim Award should cause it to be estopped from challenging the decision on the law to apply in the arbitration.

III. THE ARBITRATION AWARD DID NOT CONSTITUTE A MANIFEST DISREGARD OF THE LAW.

A. This Court should not review the merits of arbitration awards.

The ultimate decision of the tribunal was an interpretation of the contract and the intent of the parties. Gibson disagreed with the interpretation of the contract. However, this finding of fact cannot be converted into a "manifest disregard of the law". This Court should not review factual findings of arbitration awards. Gibson concedes it "has not challenged the factual basis of the award". Petition, p. 2.

B. This Court should not create new law based upon the facts of this case.

It is undisputed that the concept of "manifest disregard" is very narrowly applied. Gibson "acknowledges that the 'manifest disregard' standard of review is narrow." Petition, p. 6. In fact, "(i)t is well established that a mere error in the interpretation or application of law is insufficient to meet this standard." *Merrill Lynch, Pierce, Fenner & Smith, Inc.*

v. Jaros, 70 F.3d at 421. However, Gibson fails to cite any United States court that has ever vacated an arbitration award due to the "manifest disregard" standard. Therefore, Gibson cannot meet its burden to prove the award constituted a "manifest disregard of the law".

The limited statutory grounds for vacation of an arbitration award are clearly set forth in 9 U.S.C. § 10(a). A party may request a court to vacate an award "*(w)here the arbitrators exceeded their powers*, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). (Emphasis added). In this case, Gibson correctly states that an award can be vacated if the arbitrators "exceeded their powers", but Gibson cannot prove the arbitrators exceeded their powers in this case or establish any other ground for vacation of the award under Section 10(a).

The concept of "manifest disregard" was judicially created. Manifest disregard "generally remains a theoretical construct" and *no* commercial arbitration awards have been vacated on this ground. S. L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 776 (Spring 1996). Any application of the "manifest disregard" standard that allows a reviewing court to evaluate the merits of the arbitrator's award is "not legitimate." Hayford, *supra*, at 814. The " 'manifest disregard' of the law standard is defensible only if, in application, it effectively insulates the merits of the commercial arbitration award from such judicial interference." *Id.*

This Court has only made three collateral references to "manifest disregard" since 1953. Hayford, *supra*, at 775.

When lower courts have mentioned the concept, they have been careful to outline the narrow and specific circumstances in which it can be considered. An arbitration award based on manifest disregard of the law that is not enforced presupposes something beyond and different from a mere error in law or failure on the part of the arbitrators to understand or apply the law. *Saxis S.S. Co. v. Multifacs Intern. Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967).

It is clear from case law that "a party seeking to vacate an arbitration award on the ground of manifest disregard of the law may *not* proceed by merely objecting to the results of the arbitration." *O.R. Sec., Inc. v. Professional Planning Assocs., Inc.*, 857 F.2d 742, 747 (11th Cir. 1988). Like *O.R. Sec.*, Gibson objects to the results of the arbitration. Manifest disregard of the law clearly means more than error or misunderstanding (by the arbitrator) with respect to the law. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986). In addition, (the courts) are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it. *Id.*

If courts considered the manifest disregard standard, they did so where it was sufficiently argued that the arbitrators identified the relevant law but decided to *ignore their findings* and expressly disregard the applicable law. *O.R. Sec*, 857 F.2d at 747. The arbitrators in this arbitration did not disregard applicable law. An analysis of the Interim Award demonstrates that the arbitrators outlined what they considered the thorough arguments of both parties as to the applicability of Tennessee or German law.

After hearing and considering all presented arguments, the arbitration panel unanimously concluded that the correct law to govern the arbitration was the contract itself and, in case of conflict, international principles of contract law. In *Primary Coal*, the arbitrator was urged to draft an interim award regarding the applicable law. *Primary Coal v. Compania Valenciana de Cementos Portland*, International Chamber of Commerce Case Number 5953. Also, in *Primary Coal*, the arbitrator ruled that neither Spanish nor United States law governed, but international principles of contract. After reviewing the contract and the parties' behavior, the arbitrator determined that the parties did not want either legal regime to govern the contract. After the Cour d'Appel de Paris affirmed the arbitrator's decision by citing Article 13(3) of the ICC Rules, the door was opened for the application of the generalized law of merchants.

Like *Primary Coal*, the arbitrators interpreted the contract and concluded that international principles rather than a national law were intended to govern. It is clear that the arbitrators did not determine that a national legal order governed and chose to ignore it. Rather, the arbitrators established the law to be used when terms of the contract conflicted with the national law of the parties.

The burden of proving that arbitrators acted in manifest disregard of the law is an extremely high one. *Wall Street Associates, L.P. v. Becker Paribas, Inc.*, 818 F. Supp. 679 (S.D. N.Y. 1993). This burden belongs to Gibson, who must prove that the arbitrators' decision met the narrowly-defined concept of manifest disregard. Although Gibson's counsel has frequently used the term, Gibson has not approached anything close to proving that the arbitrators actually failed to conduct their duties as set forth in 9 U.S.C. § 10(a), or in

the judicially-created, but rarely used standard of manifest disregard of the law.

C. Gibson wants the award vacated because it is displeased with the result.

It is well-established that a party may not await an adverse arbitration award before asserting objections on grounds of which he had knowledge prior to the issuance of the award. *Graphic Arts*, 489 F. Supp. 787. In fact, Gibson previously stated that it "has not levied any challenge to the arbitrability of the issues presented to the arbitrators or the qualifications of the arbitrators, nor has it otherwise challenged the mechanics by which the award was rendered".

The doctrine of manifest disregard of the law implies that an arbitrator appreciates the existence of a *clearly governing legal principle* but decides to ignore or pay no attention to it. *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Intern. Ltd.*, 888 F.2d 260 (2d Cir. 1989). Gibson mentions the New York Convention as additional applicable law that was ignored by the arbitrators. Again, if the terms of an agreement grant the arbitrators complete discretion to choose the applicable law, clearly governing legal principles do not exist in this case. Gibson's flawed logic reinforces MEC's position that Gibson is simply displeased with the arbitrator's decision.

IV. THE AWARD OF LOST PROFITS WAS AN APPROPRIATE REMEDY.

The arbitration panel awarded lost profits in accordance with the Terms of Reference and the Interim Award as damages for Gibson's failure to perform its obligations under

the distribution agreement. Prior to the final award, Gibson made no objection to the inclusion of money damages as an issue to be resolved in the Terms of Reference.

A. The arbitrators were permitted to award monetary damages as a result of Gibson's breach of the contract.

The manner of computing damages for breach of an agreement, which provided for arbitration of any dispute arising during the execution of the agreement, was for the arbitrator and not the courts. *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299 (2d Cir. 1963), *cert. denied*, 373 U.S. 949 (1963). Since Gibson failed to ship product ordered by MEC pursuant to the distributorship agreement, the arbitrators properly awarded lost profits to achieve justice among the parties. When both parties agreed to the language in the Terms of Reference, both parties knew that the award of damages was an issue. The arbitration incorporated the Terms of Reference. Therefore, Gibson cannot solely rely on the express terms of the written contract.

B. In addition to the fact that Gibson did not raise specific performance until after the final arbitration award, it is not an appropriate remedy.

An award in 1997 requiring Gibson to fill back-orders from 1993 would be outside the Terms of Reference. Furthermore, such a delivery would not be an effective remedy. Effective equitable remedies must provide a solution to the situation presented. In this case, a late 1997 award of hundreds of guitars, which were back-ordered in 1993, does not offset the aggrieved party's damages. MEC was

originally organized in 1986 for the purpose of being the exclusive distributor of Gibson guitars in Germany. Since Gibson had no other German distributor, this was a mutually beneficial relationship.

Gibson claims that the arbitration award should only allow the award of the back-ordered guitars from 1993, which is patently unfair. First, MEC has not been a distributor of Gibson guitars for almost five (5) years and, therefore, does not have the capabilities of turning a profit on this product shipment. Furthermore, the customers that ordered the guitars in 1993 have most likely obtained a replacement instrument in the intervening five (5) years. Therefore, it is probable that the customers do not need or want the product after such a delay in delivery.

Gibson attempts to argue Section 2-716(1) of the Uniform Commercial Code that "specific performance may be decreed when the goods are unique or in other proper circumstances." This argument has no merit and makes little sense. With the possible exception of custom guitars, guitars in themselves are not necessarily unique goods. While it is true that a certain kind of guitar may produce a desired sound or look, a customer who needs an instrument is not going to wait indefinitely to obtain a specific guitar. It is certainly clear that the majority, if not all, of MEC's 1993 customers did not consider the Gibson guitars they ordered to be so unique that they are still waiting to purchase them. This is especially true since there are new European dealers that have been selling Gibson guitars during this litigation.

In fact, Gibson argues MEC's position in favor of money damages when it cites Section 2-715 of the UCC. This section permits the buyer to recover "any reasonable expense

incident to the delay or other breach" by seller. *This is exactly what MEC was awarded in the arbitration.* Since specific performance is not a viable remedy, the only possible remedy is the dollar amount lost by MEC as a result of Gibson's failure to deliver product.

1. Specific performance is prohibited by law.

If Gibson had included specific performance as an issue in the Terms of Reference and presented its case for such in a timely manner, MEC would have had the opportunity to consider if such a remedy was legal. First, MEC might be acting illegally if they distributed products from Gibson after Gibson had entered into contracts for distribution with others in Germany. Second, the new distributor might well be entitled to an injunction against MEC for selling Gibson guitars in a territory exclusively reserved for their company. Third, specific performance would result in MEC distributing Gibson product without a license. If a remedy is illegal, it is not a valid remedy.

V. IF THE VIENNA CONVENTION AND THE UNIFORM COMMERCIAL CODE WERE APPLICABLE, THE ARBITRATORS' AWARD WAS APPROPRIATE.

The Interim Award precludes application of either the Vienna Convention or the Uniform Commercial Code ("UCC") as legal standards by which to determine an arbitration award in this case. Although Gibson argues that the Vienna Convention applies to this transaction, there is no legal precedent that requires that the "internationally recognized principles of contract law" set forth by the arbitrators in the Interim Award be tied to the Vienna

Convention. Again, Gibson drafted the document empowering the arbitrators to choose the applicable law and now wants to overturn the award based on the law applied in the Interim Award.

Gibson attempts to garner support for legally unsubstantiated conclusions by seeking codification of "internationally recognized principles of contract law" into completely different bodies of international law. However, even if the Vienna Convention and the UCC were found to be applicable, their provisions do not deny MEC the relief to which the arbitrators found it was entitled.

A. Application of the Vienna Convention allows for an award of monetary damages.

Gibson's assertions that the Vienna Convention prohibits the award of lost profits are without merit. The Vienna Convention clearly provides the remedy of monetary damages. If the Vienna Convention is applicable as Gibson asserts in its petition, it is mandatory to emphasize the international character of the Convention by interpreting its text without recourse to any national law as characterized by Article 7, ¶ 1. The parties may only use national law if the means of interpretation provided within the scope of the Convention fails, which cannot be found in this case.

The question as to whether the parties have agreed that their distributorship agreement shall exclude all damages can be answered by means of interpretation provided by the Vienna Convention. Article 45 of the Vienna Convention enumerates the remedies available to a buyer for a seller's breach of a contract. Article 74, which allows lost profits, is incorporated into Article 45 by reference.

Gibson contends that Article 74 has been excluded from the distributorship agreement. In fact, Gibson argues that the "Tribunal acknowledged this agreement and consciously elected to ignore it." Petition, p. 8. On the contrary, the Tribunal consciously considered the agreement since it was incorporated into the Terms of Reference.

MEC and Gibson agree that Article 6 allows the parties to alter the provisions of the Vienna Convention. Article 6 emphasizes the "primacy of contract", which is exactly the emphasis placed on the contract by the arbitrators in this case. *See* United States State Department Legal Analysis, *reprinted at* 15 U.S.C.A. Appendix (West 1997). The handwritten alterations in the distributorship agreement clearly show that the parties did *not* want to exclude all damages concerning back-orders. If the arbitrators had been obligated to apply the Vienna Convention, the handwritten alterations would have to be interpreted under its terms.

According to the arbitrators' position in its award, the handwritten alterations were meant to give effect to special provisions in favor of MEC. MEC insisted on the alterations because it had an important interest in receiving the back-orders, even upon termination of the contract. Therefore, it follows that the arbitrators interpreted this clause in such a way that damages regarding back orders should *not* be excluded. If such damages were excluded, the clause provides *no* advantage to MEC. This was essentially a determination of fact through interpretation of the handwritten language and not a determination of law. There was no award of lost profits arising from the termination of the agreement but, rather, arising from the failure of Gibson to fill the back-orders as required by the handwritten provisions of the contract.

The intention of the parties was to oblige Gibson to provide the back-ordered guitars upon termination. If the provision only allowed the remedy of specific performance in the event of non-performance, MEC would receive a completely inequitable remedy. Gibson's actions upon termination illustrate this point. Gibson signed an exclusive dealership with another distributor in Germany. Gibson's provision requiring a specific performance remedy with MEC would have directly violated its agreement with its new distributor in Germany.

B. An award of monetary damages is permissible under the UCC.

The buyer is allowed to recover "any reasonable expense incident to the delay or other breach" by seller under Section 2-715 of the Uniform Commercial Code. UCC § 2-711 allows a buyer (MEC) to recover damages for non-delivery.

Gibson points out that provisions of the Vienna Convention are consistent with the law of the United States. Although Gibson's point may be correct, it is irrelevant since the Terms of Reference is the controlling document that allows the arbitrators to select the applicable law. Gibson insinuates that Section 2-719(3) of the UCC would prevent the award of lost profits in this case. However, Section 2-719(3) reinforces MEC's award. The Terms of Reference allow lost profits, which are consequential damages caused by Gibson's breach of the contract. Therefore, the arbitrators award of lost profits is certainly not unconscionable.

All arguments of Gibson relating to specific performance should be disregarded due to the fact that Gibson did not

include this as an issue for the arbitrators to resolve in the Terms of Reference. This document represented the agreement of the parties setting forth the issues to be resolved by arbitration and new issues raised after the final award certainly do not create grounds to vacate the award.

CONCLUSION

Gibson urged a harsh and inequitable interpretation of the distribution agreement which imposed no consequence on Gibson if they simply refused to fill orders for products from MEC. Gibson here seeks to convert the disregard by the arbitrators of that interpretation into a manifest disregard of the law. The Tribunal considered the evidence and made a just and equitable interpretation that the intent of the parties was that Gibson would fill the back-orders of MEC. The review of such a decision, one which was largely a factual determination, would open a flood of litigation on the theory that any tribunal that disregards one parties interpretation of a contract is disregarding the law.

This case does not merit further review by this court. For the foregoing reasons, Petitioner's Petition should be denied.

Respectfully submitted,

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